United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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74-2526

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P/S

United States Court of Appeals

For the Second Circuit.

ZOLAR PUBLISHING CO., INC.,

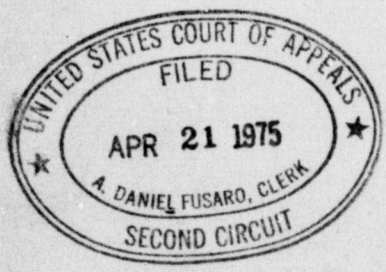
Plaintiff-Appellant,

-against-

DOUBLEDAY & COMPANY, INC., CORONET COMMUNICATIONS, INC., and INDEPENDENT NEWS CO., INC.,

Defendants-Appellees.

Appellant's Brief



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ZOLAR PUBLISHING CO. INC.

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Docket #74-2526

BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Court below grant summary judgment to the defendants contrary to the facts and law.

2. Did the contract for Zolar's Family Horoscope, standing by itself, represent an enforceable "integrated contract" or was parole or extrinsic written evidence necessary to explain the subject matter thereof?

3. Did the Court below improperly exclude from its consideration correspondence between the parties leading up to the signing of the contract for Zolar's Family Horoscope which limited the effect of the contract to one year, 1964, and which correspondence was necessary to explain the contract for such publication requiring a trial of the issues thus presented.

4. Did the correspondence between the parties subsequent to the transaction relating to Zolar's Family Horoscope constitute sufficient writings required to cancel and terminate any agreement between the parties, presenting issues to be tried by the Court?

5. Did the Court below err in not granting summary judgment to the plaintiff on the issues of the cancellation of the contract relating to Zolar's Family Horoscope?

6. Did the Court below err in rejecting jurisdiction over the plaintiff-appellant's claim for unfair competition?

7. Did the Court below err in refusing to find triable issues of fact in respect to Zolar's Encyclopedia and Dictionary of Dreams and the correspondence indicating the cancellation or termination of such agreement between the parties, or in refusing to grant summary judgment to the plaintiff herein?

STATEMENT OF CASE

Plaintiff, Zolar Publishing Co., Inc. ("Appellant") hereby appeals from an unreported opinion (a.137)

, and order and judgment of the United

States District Court for the Southern District of New York, Honorable John M. Cannella dated October 29, 1974 and entered in the office of the Clerk of the United States District Court on October 31, 1974, (a. 4)

The opinion and order dismisses plaintiff Zolar's action for copyright infringement on two publications entitled Zolar's Family Horoscope and Zolar's Encyclopedia and Dictionary of Dreams which had been published by the defendant Doubleday in 1963 and 1964. Thereafter, in 1970, under licenses erroneously issued by Doubleday to defendant Coronet they were published by defendant Coronet and distributed by defendant Independent. Plaintiff sought an injunction against the three defendants and damages by reason of their having engaged in such licensing, publishing and distribution of both titles nearly six years after both contracts with Doubleday had been cancelled. The defendant Doubleday counter-claimed for an injunction for damages by reason of plaintiff's alleged breach of Doubleday's contractual publishing and licensing rights. Honorable Justice John M. Cannella in granting defendant's motion for summary judgment held that the said contracts had not been terminated, that the plaintiff had no cause of action for breach of its copyright, and that all issues with respect to unfair competition on the part of the

plaintiff against the defendants and vice-versa were matters to be left for determination by the New York State Supreme Court if the parties were so advised (A. 4).

FACTS

Zolar's Family Horoscope

Zolar's Family Horoscope was an unpublished work prior to March 1963. It was basically an idea which had been developed by Zolar for a publication dealing with each day, week and month for the year 1964, for the signs of the zodiac applicable to each such period.

Negotiations were had between Mr.King, President of Zolar, and various representatives of the defendant Doubleday commencing with Lee Barker, one of Doubleday's Editorial Directors and Denise Rathbun, an assistant to Mr.Barker, one who was active in arranging for paperback books for production and distribution by Doubleday.

After some preliminary oral negotiations between Mr.King, Mr.Barker and Miss Rathbun, a letter was received by Mr.King dated March 18, 1963, (A. 106) which contained a fairly complete description of the physical makeup, contents, royalty arrangements, retail selling price, and generally summarized all of the negotiations up to that point. Zolar replied by

letter of March 20, 1963 (A. 107) addressed to Miss Rathbun in which he stated

> "In answer to your letter of March 18th, I agree to accept the proposed terms, the only provision being that I want a contract for one year only."

the letter then goes on to say

> "In the event that this publication proves successful, I shall expect a 10% royalty for any ensuing editions."

The proposed agreement was then sent to Zolar with a letter dated March 26, 1963 (A. 108) and that document as submitted was signed by Zolar. The only description, specification or reference to the subject matter of the contract is covered on page 1 of the Memorandum of Agreement (A. 46) in which the following appears:

> "* * * a work at present entitled ZOLAR'S FAMILY HOROSCOPE: A complete Astrological Guide for the Whole Family, hereinafter called 'the work.'"

In paragraph 5(a) of said document (A. 47) there is a statement relating to the payment of $1,500.00 as an advance against royalties

> "payable one-half on receipt of this signed agreement and one-half on receipt of complete satisfactory manuscript * * *"

There was nothing else stated in that agreement relating to the editorial contents that would be required from the author, Zolar, which would be in compliance with the requirement for

a "satisfactory manuscript" and the only place where the definition of a "satisfactory manuscript" could be found was in the exchange of correspondence, namely Rathbun's letter of March 18, 1963 (A. 106) Zolar's letter of March 20, 1963 (A. 107) and Rathbun's letter to Zolar dated March 26, 1963 (A. 108).

The publication was produced by Doubleday and under date of October 16, 1963 Mr.Replogle, sales manager, sent Zolar a letter . the first paragraph of which stated

> "Enclosed finally is the glossy photograph of the ZOLAR'S FAMILY HOROSCOPE pre-pack that holds 10 copies of the book. I hope that this will be adequate for your sales pieces."

That photograph shows Zolar's Family Horoscope in a carton on which is prominently displayed "WHAT DOES 1964 HOLD FOR YOU?" (A.91,110) (underlining supplied). This pre-pack was prepared by Doubleday.

Doubleday's sales on this title were very poor. In 1964 Zolar communicated with Doubleday about future editions of the Family Horoscope and was told by Miss Rathbun on May 7, 1964 (A. 121) that Doubleday was not interested in a 1965 edition.

Zolar's letter to Doubleday dated June 9, 1965, which came from Doubleday's files, with notations made in

defendant's office (A.) stated

> "I note you state that you sold the rights to the Family Horoscope. There is evidently some mistake here since the contract for the Family Horoscope was only actually for one year as this is a dated book."

Someone in Doubleday's office wrote the word "Spanish" before the word "rights" in the first line and then in a handwritten note Doubleday's employees wrote in the column

> "Yes its true - we've sold 1964 edition of Family Horoscope to Spanish firm. Contract was signed in Sept. 1964 and they are to publish one year from then." (Emphasis supplied)

The third paragraph of Zolar's letter of June 9, 1965 (A.121) states:

> "Sometime last year, I wrote to your editor and asked whether they would be interested in future editions of the Family Horoscope and I received a negative reply. If this firm reprints the Family Horoscope which is a 1964 horoscope, it will be useless for 1966."

In the handwriting of one of Doubleday's employees and in the column to the right of the above quotation appears the following:

> "Denise Rathbun turned down 1965 edition of Family Horoscope on May 7, 1964"

In answer to that letter and under date of June 11, 1965 Mr.Barker, Doubleday's Editor, wrote to Zolar (A.113) as follows:

> "The Contract with the Spanish publisher for the FAMILY HOROSCOPE was actually signed in

1964, and I think they were quite aware of the fact that it was a dated book. They are so slow in turning around on these things, I don't see how it is possible to get them to a FAMILY HOROSCOPE in the current year. I admit it seems kind of silly, but there it is." (Emphasis supplied)

Under date of April 27, 1966 Zolar wrote to Doubleday, attention of Miss Rathbun (A. 114) as follows:

"I would greatly appreciate if you would let me know what the final net sales were for the 1964 Family Horoscope that Doubleday published."

I am herewith enclosing a copy of my 1966 edition. You will note that the paper is far inferior to the Doubleday edition and that we also put a 75c price instead of a 95c price on the cover.

* * * *

The thought occurred to me that Doubleday might be interested in publishing this yearly paperback which is developing into a very substantial seller. * * *

* * * *

We are getting ready to make our allotment for our 1967 books and I would appreciate hearing from you at your earliest convenience."

A letter was then received from Miss Rathbun under date of May 9, 1966 (A. 112) addressed to Zolar stating

I've found my note on the total sales of the Dolphin edition of ZOLAR'S FAMILY HOROSCOPE for 1964; they are 16,000 through March '66. In view of this, it does seem even more logical for you to continue publishing the new editions yourself." (Emphasis supplied)

Zolar continued to publish annual editions of

Zolar's Family Horoscope from 1966 through 1970 inclusive with copies being sold on the newsstands of this country and elsewhere openly and notoriously.

Late in 1970 Zolar produced, distributed and offered for sale on the newsstands its 1971 edition of Zolar's Family Horoscope prominently indicating on the face thereof that it was a "1971" edition only to find that another Zolar's Family Horoscope bearing no date on the cover had been put on sale earlier. This resulted in obvious confusion and diversion of sales from Zolar's 1971 edition to the competing, undated, and unauthorized edition then found on sale. The offending edition was published by Coronet Communications, Inc. and distributed by the Independent News Co., Inc. over the same newsstands utilized by Zolar's national distributor (A. 9). Zolar had never been notified that such an edition was being produced.

Before Coronet's edition was prepared for sale that defendant's managing editor, Susan Jacobson, wrote to the defendant Doubleday under date of April 27, 1970, (A.114) stating:

> "In checking through ZOLAR'S FAMILY HOROSCOPE, I notice that the book contains a MOON TABLE for 1964. Naturally, this will have to be revised." (A.95, 114)

There is no Moon Table in Coronet's edition to give anyone a

clue to the fact that it was a reprint of an outdated 1964 edition. However, Miss Jacobson, apparently unaware that Zolar had been publishing its own editions for the past five years, requested Doubleday as follows: (A.114)

> "If you can get Zolar to provide a new moon table the book will be up-to-date and we can put a 1970 copyright in--and then the customers won't feel that they are buying an old book." (A.95,114)

There is no evidence that anyone brought any of this to the attention of Zolar. When the defendant's edition appeared on the newsstands, competing with Zolar's new 1971 edition, it came as a complete surprise to Zolar who immediately notified the defendants and each of them of the unfair competition and violation of plaintiff's copyright. This litigation then followed.

ZOLAR'S ENCYCLOPEDIA AND DICTIONARY OF DREAMS

This title, hereinafter referred to as "the ENCYCLOPEDIA", arose through another document prepared by Doubleday (A.50). The document is subject to inherent infirmities in that there is no stipulation of a retail price or minimum price at which the work would be offered to the public, no reference was made to the number of pages that would constitute the completed work, nor its size, nor the minimum number of copies to be produced by the publisher.

The vice inherent in these omissions is readily apparent when considered in the light of the publisher being given a completely free hand to produce the Encyclopedia for an exorbitant retail price which would destroy or severely limit its sales possibilities and royalties expected by the author, and when further considered from the fact that it could have been produced by the publisher in an outlandish size neither suitable for nor acceptable to the readership toward whom the publication was directed by the author. Stated differently, the publisher, Doubleday, sought to acquire by the document entitled Memorandum of Agreement dated January 21, 1963 (A.50), the unrestricted right to do as it pleased regardless of prior representations to Zolar to induce Zolar to enter into the contract believing that Zolar's projected Encyclopedia would be offered to the buying public at a reasonable price and in a handy, readily acceptable size, to mention but two of the qualities or characteristics that would have a strong bearing on the ultimate success or failure of the Encyclopedia. There was no minimum quantity stipulated which the publisher Doubleday agreed to print so that a printing of as little as 1,000 copies could have ostensibly satisfied the terms of the contract calling for the production of the Encyclopedia but which would have proved

disastrous to the author, Zolar, since even if every copy were sold, assuming a suitable price had been fixed, Zolar's publication, the Encyclopedia, would have returned a minimum royalty to Zolar, and the Encyclopedia could have been kept off the market for 28 years, to adopt the defendant's version of their rights, thus giving Doubleday an unwarranted economic power to destroy the value of plaintiff Zolar's Encyclopedia. Doubleday as a publisher could have easily brought out a competing or similar type of publication based on the experience it would have gained from producing Zolar's Encyclopedia, offering the competing publication at a lower price and in a proper size to the same market which the Zolar Encyclopedia was intended to reach. Under these circumstances testimony as to these essential factors would obviously be necessary and permissable to explain what was intended by the parties.

However, the main stance of the plaintiff author Zolar is that even accepting the Memorandum of Agreement as a binding enforceable document, the parties to it, by their own acts represented by writings, effectively terminated their relationship as hereinafter set forth.

The King affidavit, commencing at Appendix page 86 and the exhibits annexed thereto, reviews the post contract

history of the Encyclopedia commencing at Appendix 96. A limited number of copies of the Encyclopedia were published by Doubleday and about two years after the Memorandum of Agreement of January 21, 1963 King sent a letter to Barker (A.96,115) asking whether Doubleday was going to discontinue the Encyclopedia so that plaintiff could obtain whatever copies were on hand and "have the title reverted back". The defendant's office memorandum on plaintiff's letter of January 13, 1965 (A.115) reported :

"2,500 in stock and selling very slowly"

The provision for purchasing remainder copies appears in that agreement of January 21, 1963 at Appendix 52 giving the right to the author to purchase at cost all shell and bound stock. That provision is in clause 21 which is entitled "Discontinuance of Publication". There was also a statement in that clause which is the subject of a subsequent portion of this brief as follows:

> "Upon making such purchase the disposition of rights hereunder shall be by mutual agreement"

King's affidavit (A.96) refers to a custom of the trade for the author to purchase all unsold material upon the termination of arrangements with the publisher.

After King received word from Barker by telephone

that a Doubleday representative would contact him to close out the Encyclopedia relationship (A.97) King wrote to Barker on February 24, 1965 as follows: (A.97,116)

> "We have been awaiting your representative to contact me with reference to making arrangements for the closing out of my Encyclopedia and Dictionary of Dreams." (Emphasis added)

One of the defendant's employees made a note on King's letter of February 24, 1965 (A.116):

> "Original letter sent to Bob Smith 2/25/65 to poke him up"

Barker admitted oral discussions with King directed to the cancellation of the agreement of January 21, 1963 (A.97). Barker prepared a memo of reversion which would have gone through at that time except for certain English and Spanish rights which would have "automatically held it I should say" (A.98).

On March 10, 1965 Barker wrote to King (A.99,117), the important part of that letter being:

> "This letter can be considered a formal release of rights on the hard cover edition of Zolar's Encyclopedia and Dictionary of Dreams in the United States, Canada and open market."

There was still the question of the Spanish and English re-print rights and Barker wanted the British rights for at least another year and certain Spanish rights for two years (A.99,117). Summarizing, the effect of Barker's letter of

March 10, 1965 indicated that all hard cover rights were being reverted to Zolar and only the outstanding British and Spanish rights were remaining open. This was satisfactory to King (A.99).

Pursuant to the closing out arrangements, a letter was received from Doubleday, Mr. R.J.Lindquist (A.100,118) indicating 2,664 copies to be remaindered (sold back) to Zolar for 87c per copy with the letter ending:

> "All publishing and distribution rights for this title reverted to you with the release already received from Mr.Barker."

The letters from Mr.Barker dated March 10, 1965 and from Mr. Lindquist dated March 25, 1965, both employees of Doubleday, clearly conveyed the acquiescence of Doubleday to a cancellation of the outstanding agreement of January 21, 1963 with the one exception that was stated in Mr.Barker's letter relating to the English and Spanish re-print rights. The remainder copies were purchased by Zolar consistent with the discontinuance of the publishing agreement between the parties.

Subsequently and under date of April 9, 1965 another letter was received from Barker (A.119) inconsistent with the two prior letters from Barker and Lindquist referred to above in that it limited the re-sale price of a hard cover edition of not less than $2 per copy in the United States, Canada and

the Philippines leaving the rest of the world other than the U.S.A., Philippine Islands and British Commonwealth exclusive of Canada as an open market for copies produced in the English language. This confused King, particularly in the light of the two previous letters from Barker and Lindquist, who then asked Barker for an interpretation of the document of April 9 and who advised him that paragraph 4 was the principal part of that document since it meant that the British rights that he had referred to in his letter of March 10, 1965 were being retained for 6 months (A.101) and if they were not sold within that period that all rights were reverted to the plaintiff herein.

At this point there is a substantial ambiguity between the Barker letter of March 10, 1965 (A.117), the Lindquist letter of March 25, 1965 (A.118) and the so called modification agreement of April 9, 1965 (A.119).

In trying to unravel this contradictory course of conduct King requested status reports over the telephone and received a letter of June 3, 1965 from Barker (A.120) advising that Spanish rights for the Encyclopedia had been sold. King requested a copy of the contract for the sale of the Spanish rights to the Encyclopedia by letter addressed to Barker dated June 9, 1965 (A.121). Apparently no contract was ever forwarded to King up to October 25, 1965 when he again wrote

to Barker (A.122) referring to prior conversations between him and Mr. Barker to the effect that there had been no sale of the paperback rights to the Encyclopedia and ending his letter with:

> "Therefore according to our previous correspondence these rights and all other rights pertaining to this publication have of this date reverted to me."

However, King had no further word on the Spanish rights which were supposedly outstanding and had numerous telephone conversations with Barker looking for that contract, having been advised that such a contract had been signed with an Argentine publisher on April 13, 1964. King wrote again on April 25, 1966 (A.123) looking for the contract and asking for copies of the published books. Barker's secretary acknowledged the letter (A.124) and she indicated that publication was to have taken place by April of 1965. This was the last of the open items arising out of the Encyclopedia contract.

The final chapter in the Encyclopedia story came with a letter from Barker's secretary to King dated October 21, 1966 (A.125) cancelling out any Spanish rights. Their contracting party had gone out of business.

More than six months having elapsed from the date of the April 9, 1965 document when King advised Barker that

the rights had therefore reverted to the plaintiff, and the correspondence pertaining to the Spanish rights indicating that they had aborted, and King having purchased all of the remainder copies, the transaction between the plaintiff and defendant Doubleday relating to the Encyclopedia was terminated, or at the very least an issue was raised as to termination which should have been resolved at a trial.

The appearance of a paperback edition of the Encyclopedia prepared through the joint efforts of Doubleday, Coronet and Independent, the defendants herein, came to light late in 1970 at a time when no further rights existed on the part of any of the named defendants. At the very least the intent and meaning of the exchange of correspondence was a matter to be determined at a trial and not one which was given summary disposition by the Court below.

POINT I

THE MEMORANDUM OF AGREEMENT RELATING TO ZOLAR'S FAMILY HOROSCOPE AND ZOLAR'S ENCYCLOPEDIA AND DICTIONARY OF DREAMS, STANDING ALONE, ARE INSUFFICIENT ON THEIR FACES TO CONSTITUTE AN "INTEGRATED CONTRACT" AS THAT TERM WAS USED BY THE COURT BELOW

The defendants' motion for summary judgment sought to avoid trial on the grounds that the two Memorandums of Agreement (A.46, 50), executed between the parties, in 1963, are of such character by reason of paragraphs 29 thereof so as to prevent any issues arising therefrom.

These documents, standing alone and without extrinsic evidence, are unenforceable since they are lacking in major details. As a corollary, having been drawn by the defendant Doubleday, they are to be construed, in the event of ambiguity or lack of clarity, against the defendant Doubleday. Newberry vs. Kingston Plaza, 31 A.D. 2d 862; Rentways Inc. vs. O'Neill Milk & Cream Co., 308 N.Y. 342.

Defendant Doubleday placed great stress upon the documents signed between the parties as foreclosing the plaintiff from recovering in this action. These documents are unenforceable, without more being shown, for the following reasons.

Taking First Zolar's Family Horoscope, the document

dated March 22, 1963 (A.46) refers to it in the following language.

> "A work at present entitled Zolar's Family Horoscope: A Complete Astrological Guide for the Whole Family, hereinafter called 'the work'".

Considering the fact that we are dealing with a literary production not then in existence, but to be produced some time in the future, what was contemplated as constituting performance on the part of the plaintiff? For example, had the plaintiff delivered a manuscript consisting of twelve typewritten pages, one for each month of the year, would this satisfy the obligation of the plaintiff to defendant Doubleday? Or was the manuscript to include a page for every day of the year? Or was the manuscript to include only a single paragraph for each day of the year? Or was the manuscript to consist of sufficient material to fill a one hundred or a four hundred page publication, and, if so, what were the page sizes to be, 8 x 11, 5 x 7, or 4 x 6? Or was the manuscript to be sufficient for a twelve page folder, to be carried in an inside coat pocket, or was it to contain four hundred words per page for a total of two hundred forty pages of "pocketbook" size? Was it to deal with horoscopes (predictions) alone or was it to include a Zodiac calendar (Astrological positions)? What was to be delivered by plaintiff

to defendant under this document that would satisfy the publisher? For the publisher, defendant Doubleday surely had to be satisfied as witness ¶4 reading.

> "4. The author (plaintiff) shall deliver to the publisher two (2) finally revised copies of the work, satisfactory to the publisher in content and form, including all illustrations and other graphic material essential to the work..." (Underlining supplied)

Then follows other requirements as to illustrations, index and graphic material, which the publisher may supply where the author defaults, the charge therefor being made against author's account. What were these items that the author, Zolar, was obligating itself to deliver?

Looking at ¶4, read in conjunction with the introductory paragraph referred to above, it appears inferentially that there must have been some prior negotiations between the parties, without which this document would be unenforceable since it lacks definiteness and certainty. Geiger vs. Busch, 288 N.Y. 365, 43 N.E. 2d 445; United Press vs. New York Press, 164 N.Y. 406, 58 N.E. 527. For a document to stand entirely alone, it must be possible to ascertain the full meaning with reasonable certainty. The promises and the performances to be rendered by each party must be reasonable certain. Valashinas vs. Koniceto, 283 A.D. 13, aff'd 308 N.Y. 233, 124 N.E. 2d. An agreement from which the full intention

of the parties cannot be ascertained with reasonable certainty is unenforceable. Vanguard Military Equipment Corp. vs. Schulein, 266 A.D. 912.

Although there are four pages consisting of twenty nine articles, printed in six point, miniature type, there is not one reference therein to the actual composition to be prepared and submitted by the author and which the publisher would be bound to accept. Stated differently, as a matter of law these documents could not be specifically enforced unless the missing basic elements could be legally supplied by extrinsic proof; such proof would serve to explain the circumstances which explain the transactions.

However, the plaintiff (author) has shown the Court below that the missing terms and conditions did exist prior to the execution of the documents, sufficient to establish the nature and limitations of the agreement in connection therewith.

Parol or extrinsic evidence may be admissible to show that the parties to a written contract of sale of personal property merely describing the property as a class or subject contemplated a particular quality or kind within the descriptive terms. Vogel vs. Weissmann, 23 Misc. 256. Thus, where a written contract called for a door "with fancy

embossed glass" it has been held that oral evidence to show that at the time of execution of the contract it was agreed that the door should contain oval glass was not admissable as varying the terms of a written contract but was competent to explain the intention of the parties as to language which was not sufficiently specific or complete. Vogel vs.Weissman (supra). Where there is ambiguity, uncertainty or lack of details in the agreement, the intention of the parties must be ascertained in the light of the surrounding facts and circumstances and parol evidence is admissible for that purpose. Tobin vs. Union News Co., 18 A.D. 2d 243; Laskey vs. Rubel Corp., 303 N.Y. 69. Written evidence, such as was presented to the Court below, should therefore have been given prime consideration.

With these basic principles in mind, and considering that the Memorandum of Agreement documents are completely silent as to what the author was to prepare and deliver, and what the publisher was obligated to accept as performance (without regard at this point to publishers' unrestricted right to reject any submission under ¶4), an understanding of what was bargained for in this action comes from extrinsic written, not parol, evidence which explains what the parties intended.

Considering first Zolar's Family Horoscope, Exhibit "A" annexed to King's affidavit of February 5, 1974 in opposition (A.106), is a letter from defendant Doubleday's editor Rathbun dated March 18, 1963 in which she particularizes the production as:

a) An advance of $1,500.00;
b) A royalty of 6% of retail price of 95 cents (retail price not covered in document);
c) 240 pages;
d) Each page of 400 words, 39 lines of 57 characters each;
e) Larger pages than plaintiff's "It's All in the Stars";
f) Pages only hald the size of plaintiff's pamphlets;
g) 8 pages devoted to front matter;
h) 19 pages for each sign of the Zodiac;
i) 7 pages for general characteristics;
j) 12 pages, one page for each month;
k) 4 pages for a general introduction; and
l) November, 1963 publication.

Only by resort to this letter and Zolar's reply of March 20, 1963 (A.107) could anyone interpret the so-called Memorandum of Agreement of March 22, 1963. But, since Rathbun's letter of March 18, 1963 had asked for an indication of acceptance from Bruce King, he promptly replied by letter of March 20, 1963 addressed to her (A.107), Exhibit "B" annexed to King's affidavit of February 5, 1974, in which he stated:

a) Accepted terms of her letter;
b) "Want a contract for one year only", obviously

a reference to 1964 edition, or at least a question of fact to be resolved;
c) Had expected a 10% royalty on this issue;
d) Would expect a 10% royalty on any ensuing editions; and
e) Enclosed a sample of proposed editorial copy to be included in the Horoscope.

It is abundantly clear that the parties were dealing for "one year" only at that time, that year being 1964.

In addition, in her letter to King of March 26, 1963 (A.108) and on page 1 she:

a) Encloses two copies of the contract;
b) Sets forth the organization of the material; and

on page 2

c) Keeps the annual forecast (see the Dolphin edition of Zolar's Family Horoscope to be submitted on the argument, which identified the book as 1964).

Further reference to Exhibit "D" annexed to the King affidavit of February 5, 1974 (A.110) is a photo of a selling container designed and manufactured by the defendant Doubleday carrying the legend "What does 1964 hold for you?", and "Your complete horoscope for every day", again referable to 1964. This is further probative extrinisc evidence that Zolar's Family Horoscope was intended to be a one year proposition for 1964 only. It was so identified in defendant Doubleday's Edition (A.71).

Unquestionably, the so-called contract, or

Memorandum of Agreement, of March 22, 1963 (A.66) is vague, indefinite and uncertain as to the subject matter and without further clarification and standing by itself represents an unenforceable agreement. The promises and the performances to be rendered by each party must be reasonable certain, 9 N.Y. Jurisprudence, Contracts, page 576, §46. Even if the State of Frauds were involved in this proceeding, parol or extrinsic evidence would be admissable to cure the obvious defects. The New York Court of Appeals in Stulsaft vs. Mercer Tube, 288 N.Y. 255, at page 259 stated the rule applicable to this motion as:

> "A complete agreement so made is not void under the State of Frauds, though the writing which is intended to satisfy the statute sets forth only the promises upon which there has been discussion and express agreement, provided the writing itself when read with reference to the relations of the parties and the surrounding circumstances known to both, sufficiently identifies also the other terms and conditions where agreement was tacit." (Emphasis added)

Continuing at page 260, the Court stated:

> "To give heed to these things is not to ignore the rule that the writing must contain all the material terms of the agreement. It is to explain the memorandum without changing or enlarging it. Marks vs. Cowdin (supra) 145"

However, that court also stated that a motion for summary judgment was not the proper method of disposing of the controversy in the following language, at page 260, which is equally

appropriate in this proceeding:

> "The construction and sufficiency in law of the memorandum must in this case await trial at which rpoof of the existing relations of the parties and other circumstances known to both parties may clarify the meaning of the letter and identify the terms of the employment." (Emphasis supplied)

The document of March 22, 1963 (A.66) without the extrinsic evidence would have been unenforceable; with the surrounding circumstances taken into account, the 1964 edition for a one year term was all that was bargained for and sold.

The same argument applies with equal force to the Encyclopedia Memorandum of Agreement (A.76)

POINT II

THE CANCELLATION AND TERMINATION OF DOUBLEDAY'S PUBLISHING RIGHTS IN AND TO ZOLAR'S FAMILY HOROSCOPE ARE REPRESENTED BY SUFFICIENT WRITINGS UNDER SECTION 15-301 OF THE GENERAL OBLIGATION LAW.

The sales of Zolar's Family Horoscope by Doubleday were extremely poor.

On May 7, 1964, he inquired of Rathbun about a 1965 edition. Rathbun turned it down (A.121). In that same letter defendant Doubleday"s employees noted that the 1964 edition had been sold to a Spanish firm in September of 1964 for publication within one year thereafter. In King's letter of

June 9, 1965 (A.121) he called Barker's attention to the fact that a sale of Spanish rights at that late date was a mistake since Family Horoscope

> "was only actually for one year as this is a dated book." (A.121)

On that same letter is Doubleday's notation

> "Yes, its true." (A.121)

There was this abundant evidence presented to the Court below to establish both from the agreement and post agreement writings that Doubleday's edition of Family Horoscope was for one year and that year was 1964.

In that same letter King referred to the fact that Doubleday had refused future editions (A.121). He also referred to the Spanish rights sale in the following language:

> "If this firm reprints the Family Horoscope which is a 1964 Horoscope, it will be useless for 1966."

Barker fully agreed that it was

> "kind of silly, xxx" (A.113)

He also stated

> "We just don't know how to sell these books."

At this point a 1965 edition had been refused by Doubleday. King persisted.

King wrote to Rathbun on April 27, 1966 (A.111) and he:

a) Asked for final sales on 1964 edition;
b) Enclosed a copy of his 1966 edition;
c) Asked whether Doubleday would publish future issues; and
d) Advised he was preparing 1967 edition.

There was no hue and cry of any interference with any contractual rights or any claim of priority rights on the part of Doubleday. Rathbun replied to King under date of May 9, 1966 (A.112) and noted 1964 sales of 16,000 copies and ended by saying:

> "In view of this, it does seem even more logical for you to continue publishing the new editions yourself."

Rathbun had handled all of the prior negotiations and transactions. She knew the contents of her correspondence with the plaintiff setting forth the necessary details to make the document of March 22, 1963 meaningful. In effect, Doubleday said, 'we tried the 1964 edition and it was a disaster - good luck to you Mr.King and go on publishing future editions if you want to, but it's not for us.' As far as Doubleday was concerned Zolar's Family Horoscope was through, finished and done with. That is the clear import of the exchange of correspondence. General Obligations law section 15-301 was certainly complied with. Both Barker and Rathbun, authorized spokesmen for Doubleday, said so in the clearest language. The 1967 edition was similarly rejected (A.114)

The Court below erred in ignoring the plain import of those documents.

The argument that the plaintiff produced editions of Zolar's Family Horoscope in violation of the alleged contract restrictions is to take a plain state of facts and distrort them into an illogical and untenable position.

What's more, the plaintiff openly, notoriously, and without stealth or subterfuge, sold six annual editions of Zolar's Family Horoscope on 110,000 newsstands in the United States and Canada. Doubleday distributed and sold other publications on the same newsstands at the same time and knew from King's letters that plaintiff's annual editions of Zolar's Family Horoscope were enjoying public acceptance of its products. King affidavit (A.93).

There was no infringement of defendant's rights to the 1964 Zolar's Family Horoscope, since its editorial content, like a calendar, expired and became useless for any purpose on January 1, 1965. In addition, the defendant Doubleday, by writings from Barker and Rathbun its authorized employees, had not only refused future editions, but had in effect given the plaintiff a green light to go ahead. Under these admitted facts there was a waiver of any rights to future editions of the Horoscope which would support the defendant's claim for an

injunction by reason of unfair competition. The Court below erred in finding that Doubleday retained any licensing rights in and to the Horoscope. Each annual edition of Zolar's Family Horoscope produced by plaintiff had a separate number assigned to it by the Copyright Office evidenced by the notice published therein. The literary material was original and different in each edition. Zolar's 1971 edition could not have been the subject of any conflict as alleged by Doubleday.

POINT III

THE MODIFICATION AND CANCELLATION OF THE "DREAM BOOK" WAS EVIDENCED BY THE CORRESPONDENCE AND ACTS OF THE PARTIES AND WAS EFFECTIVE TO TERMINATE DEFENDANTS' INTERESTS THEREIN, OR AT LEAST RAISE A TRIABLE ISSUE.

The document of January 21, 1963, entitled Zolar's Encyclopedia and Dictionary of Dreams (A.76), presents the matter of the interpretation of several clauses dealing with the termination of the relationship between the parties.

It is axiomatic that what the parties have agreed to do, they can agree to undo, or terminate by agreement between them. Within the document are numerous provisions which look forward to the possibility of termination of the relationship.

Publishing a book is a blind and speculative endeavor. In this instance, there were no customers who had previously committed themselves to buy copies when published. The books were to be offered to the buying public through the book-sellers with the full right of return of all unsold copies, as set forth as follows:

> "¶5 The Publisher shall publish the work... and shall pay to...the Author the following:
>
> a) On all copies of the regular trade edition... less returns..." (Emphasis added)

In the event of a bad or poor sale, it is a trade custom to be proved at trial for the publisher to liquidate unsold inventory through several means, such procedure being provided for in paragraphs 7 (A.77) and 21 (A.78). Although paragraph 3 (A.76) provides for a copyright in author's (plaintiff's) name, and for a license to be given to the publisher co-extensive with the license, it also realistically recognizes the fact that the term of copyright was not necessarily controlling or binding for that period. For example, that clause reads:

> "The Author further agrees to assign to the Publisher if this agreement has not terminated previously...." (Emphasis added)

The publisher retained the unilateral right to terminate in paragraph 21, (A.78) as follows:

> "The Publisher in its discretion may at any time

> determine to discontinue the publication of the work without prejudice to its rights hereunder. In that event, it shall give notice of such determination to the Author by registered mail at the address last given by him. Within thirty days after the mailing of such notice the Author shall have the right to purchase from the Publisher at cost any existing sheet and bound stock which is the unrestricted property of the Publisher. Upon making such purchase the disposition of rights hereunder shall be by mutual agreement."

Mutuality of obligation is lacking, as a matter of Contract Law. For example, the publisher (defendant) could decide to terminate, regardless of sales experience even if sales were good, in favor of publisher (defendant) putting out another similar encyclopedia of their own production. To follow the reasoning of defendant the author (plaintiff) would literally have to idly sit by disenfranchised and unable to promote his book until the statutory copyright and renewal period had expired. The quoted clause is invalid since it is manifestly unfair, unjust and overreaching.

The rule is that where either party to a contract reserved an unlimited right to determine the nature and extent of his performance, his obligation is too indefinite for legal enforcement where the promisor retains an unlimited right to decide later the nature or extent of his performance. Williston on Contracts 3rd Ed. §44, Chiapparelli vs. Baker, K & Co.,252 N.Y. 192, 9 N.Y. Jurisprudence, Contracts §48, page 578.

Violative of this rule of law in particular is the last sentence of paragraph 21 (A.78) reading:

> "Upon making such purchase the disposition of rights hereunder shall be by mutual consent."

This is an illusory provision since what it really means is that publisher (defendant) shall really be the one to determine the disposition of rights, again a unilateral undertaking in fact and practice.

Against this background and drawing only on the correspondence annexed to the King affidavit of February 5, 1974, the record shows:

> 1/13/65 - King's letter to Doubleday asking "Are you going to discontinue publishing the Zolar's Encyclopedia and Dictionary of Dreams? If so, I would like to make arrangements to take whatever copies you have off your hands, and have the tile (sic) reverted back to me." (Emphasis added)
>
> 2/24/65 - King's letter to Doubleday asking Mr.Barker "...to contact me with reference to making arrangements for the closing out of my 'Encyclopedia and Dictionary of Dreams.'" (Emphasis added)
>
> 3/10/65 - Barker's letter to King - "This letter can be considered a formal release of rights on the hardcover edition of Zolar's Encyclopedia and Dictionary of Dreams in the United States, Canada and open market..."

Then followed a reservation of soft cover rights for the next six months and

> "But if nothing happens within the next six

months we will release the reprint rights to you as well."

British and Spanish rights were referred to but they were self-terminating in one year and two years. Doubleday had thus terminated the hard cover aspects of the document of January 21, 1963, leaving the soft cover reprint portion to be terminated in six months lacking a sale in the interim. The remainders were purchased by King, as part of and in conformity with the discontinuance proceedings.

3/25/65 - Doubleday's Mr.Lindquist wrote to King "All publishing and distribution rights for this title reverted to you with the release already received from Mr.Barker."

This was the clear understanding of all of the Doubleday employees contacted by King.

The Barker letter to King of April 9, 1965, (A.119) muddied the waters and imposed a $2.00 minimum price on a hard cover book in the United States, Canada and the Philippines, and them comes a confusing clause:

"...territory other than the U.S.A., the Philippine Islands and the British Commonwealth (exclusive of Canada) being an open market for copies produced in the English language."

The questions arise as to what is the meaning of an "open market". An "open market" for Doubleday or someone else? An "open market" for a "hard cover" or a "soft cover" book? Or

did this mean that both plaintiff and defendant Doubleday could compete in the "open market" regardless of cover or price?

The letter of April 9, 1965 states:

> "2. All other rights...remain in our sole and exclusive possession."

But the Barker letter of March 10, 1965 (A.117) and the Lindquist letter of March 25, 1965 (A.118) reverted all rights other than certain British and Spanish rights and soft cover reprint rights which Doubleday retained for the next six months. At this point, oral testimony of King's conversation with Barker to clarify these ambiguities is admissable. Stulsaft vs. Mercer Tube 288 N.Y. 255.

King, by letter of October 25, 1965 (A.122) addressed to Barker, stated:

> "According to our previous correspondence these rights and all other rights pertaining to this publication have of this date reverted to me."

Nothing further was done by the defendant Doubleday to indicate that there was any other or different agreement or arrangement. There was a duty on Doubleday to speak and they did not. If on no other theory than estoppel, they may not now claim to have any rights in Zolar's Encyclopedia.

As stated in 21 N.Y. Jurisprudence, Estoppel §34:

"Estoppel to question or object to a thing done or a position taken by another may arise from express consent thereto. Graphically stated, he who consents to the showing is not allowed to deny the sower;s right to reap. Also, one who stands by and induces the belief that he assents will not thereafter be heard to complain of the act that another might have abstained from if dissent had been announced. Liebermann vs.Templar, 236 N.Y. 139; Benson vs. Morse, 109 N.Y.S. 2d 57; Giles vs. Klauder Weldon, 233 N.Y. 470"

If there is any question about the interpretation of the foregoing, then there are factual issues raised for trial, as to whether Doubleday's license covering the Encyclopedia terminated or continued as of October 25, 1966. The Court below erred.

POINT IV

UNDER ANY VIEW OF THE PROGRAM OF THE DEFENDANTS IN PUBLISHING THE HOROSCOPE AND ENCYCLOPEDIA, BASED ON THE FACTS HEREIN, THE DEFENDANTS ARE LIABLE FOR ROYALTIES

Unfair competition and copyright infringement aside, if the defendants had any residual rights to reprint either publication under their copyright licenses, there was a concomitant obligation to pay royalties to the plaintiff. Under the document of March 22, 1963 pertaining to the Horoscope, the defendant Doubleday was obligated to pay to the plaintiff

50% of the proceeds of sales. But no sale could be made under the contract without Zolar's consent. According to Exhibit "G" annexed to defendant's moving papers, Paperback Library (Coronet) agreed to pay Two Thousand Five Hundred Dollars ($2,500.00) as an advance. The cover price was ninety five cents per copy. The royalty to be paid was six cents per copy. According to sales figures received from the defendants but not audited or otherwise verified, 40,000 copies were allegedly sold. An accounting would be required to be taken at a very minimum.

With respect to the Encyclopedia Paperback's contract with Doubleday dated April 24, 1969, Exhibit "J" to defendant's moving papers, an advance of Three Thousand Dollars ($3,000.00) was to be paid against a royalty of 7-1/2% per copy on a sale of 71,500 copies, an unaudited figure. Based on a cover price of $1.25, this would be a mimimum of approximately Five Thousand Four Hundred Dollars ($5,400.00).

However, on the basis of a violation of plaintiff's copyrights and unfair competition, profits of approximately Thirty Seven Thousand Dollars remain to be accounted for, subject to audit.

Under the facts and circumstances surrounding these transactions, issues are raised which require a trial for disposition.

POINT V

EXTRINSIC EVIDENCE OF CANCELLATION AND INTERPRETATION ARE PROPER

Defendants argue against extrinsic evidence on the ground that the contract between the parties for both publications are sufficient in and of themselves, and that in any event, the contracts having been performed, extrinsic evidence is not admissable under any circumstances. Plaintiff contends in this proceeding that the extrinsic evidence pertaining to the production of both publications is admissable to show not only the physical characteristics of the publications, which were apparently agreed upon and completely defined by the correspondence between King and Rathbun, but also the term thereof. Important details are never mentioned in the agreements which the defendants claim was complete in and of itself. It is absolutely essential to go outside of the document and resort to Rathbun's prior correspondence with the plaintiff to determine these details, and it was with these circumstances necessarily surrounding the transaction that the agreement between the parties of March 22, 1963 must be considered; Stulsaft vs. Mercer Tube and Manufacturing Company,288 N.Y. 255.

There is an argument which should be dispositive of both the Horoscope and Encyclopedia contentions submitted by the defendants, which arises from the very law which defendants

have argued prevents any reference to any matters, writings or conversations outside the confines of the two so-called agreements between the plaintiff and the defendant.

The defendants argued that General Obligations Law, Section 15-301 foreclosed any argument with respect to the termination or other disposition of the aforementioned agreements. But this argument completely overlooks the plain language of those sections which acknowledges that such an agreement containing a provision against oral change can ever

> "...be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom infringement of the change is sought, or by his agent."
> (subdivision [1] (Underlining supplied)

In addition to the change provision recited above, there is also an awareness and recognition of the possibility of terminating such an agreement, and in this connection subdivision (2) thereof has an alternative provision, reading as follows, namely that it:

> "(c)...cannot be discharged by an executory agreement unless such executory agreement is in writing and signed by the party against whom infringement of the discharge is sought, or by his agent...or is evidenced by a writing signed by the party against whom it is sought to enforce the termination, or by his agent." (emphasis added)

Rathbun, who negotiated the Horoscope contract with the plaintiff, declined any further relationship with the

plaintiff after the publication of the 1964 edition, and her authority in this connection is amply established by the record. In behalf of defendant Doubleday, she stated clearly and unequivocally in writing that defendant Doubleday wanted no further part of the Horoscope. By the same token, and in the same manner, the Encyclopedia which had been negotiated for the defendant Doubleday by Barker, by his letter of March 10, 1965, as part of an exchange of correspondence with the plaintiff, stated that the letter was "a formal release of rights on the hard cover edition". The soft cover rights were to be released in Six (6) months. All of this is in writing and signed by Lee Barker, again an authorized agent of the defendant Doubleday and sufficient to comply with Section 15-301 of the General Obligation Law.

The defendants' argued that a subsequent writing between the plaintiff and the defendant Doubleday indicating that "All other rights granted to us under the agreement of January 21, 1963..." in some manner worked a revival of rights that had been relinquished previously. As to the meaning of that clause, based upon the prior correspondence between King, Barker and Lindquist, coupled with the fact that the plaintiff purchased the entire remaining stock of the Encyclopedia held by the defendant Doubleday, evidenced a termination of the agreement except for certain soft cover reprint rights during the

following Six (6) months.

The rule of law applicable to this situation appears in Stulsaft vs. Mercer Tube and Manufacturing Company, supra, a leading case in the State of New York on the subject of extrinsic evidence, and in which that Court stated, at page 260:

> "The construction and sufficiency in law of the memorandum must in this case await trial at which proof of the existing relations of the parties and other circumstances known to both parties may clarify the meaning of the letter and identify the terms of the employment.
>
> The judgment should be reversed, with costs in all courts to the appellant and the motion for summary judgment denied, with ten dollars costs."

The Stulsaft case, supra, also answers the argument made by the defendants in this proceeding that where a contract has been executed extrinsic evidence of the meaning of the contract may not be offered and received in evidence. The Stulsaft case held to the contrary. The plaintiff was employed under a contract completely silent as to the terms of compensation although he had previously been employed as a salesman on a fixed commission of Two and One-Half Percent (2-1/2%) of his sales. After a period of employment under the written agreement, silent as to compensation, the plaintiff Stulsaft's employment was terminated. The Court held that extrinsic evidence as to the terms of employment was clearly

admissable, even though the employment had terminated. The defendants' argument cannot prevail.

CONCLUSION

POINT VI

THE COURT BELOW ERRED IN APPLYING THE PROPER RULE OF LAW AND IN FINDING THAT NO ISSUES OF FACT REQUIRED A TRIAL. THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED, JUDGMENT GRANTED TO THE PLAINTIFF, OR AT THE VERY LEAST THE ENTIRE MATTER SHOULD BE REMANDED FOR TRIAL.

Respectfully submitted

Stanley M. Estrow
Attorney for Plaintiff-
Appellant

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 21 day of APRIL, 1975 deponent served the within BRIEF upon SATTERLEE & STEPHENS

attonrye(s) for DEFENDANTS

in this action, at 277 PARK AVE
N.Y.N.Y. 10017

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey
ROBERT BAILEY

Sworn to before me, this
21 day of APRIL, 1975.

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976